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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 953

JAMES M. CRUME,

Petitioner,

vs.

PACIFIC MUTUAL LIFE INSURANCE CO.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN
SUPPORT OF PETITION.**

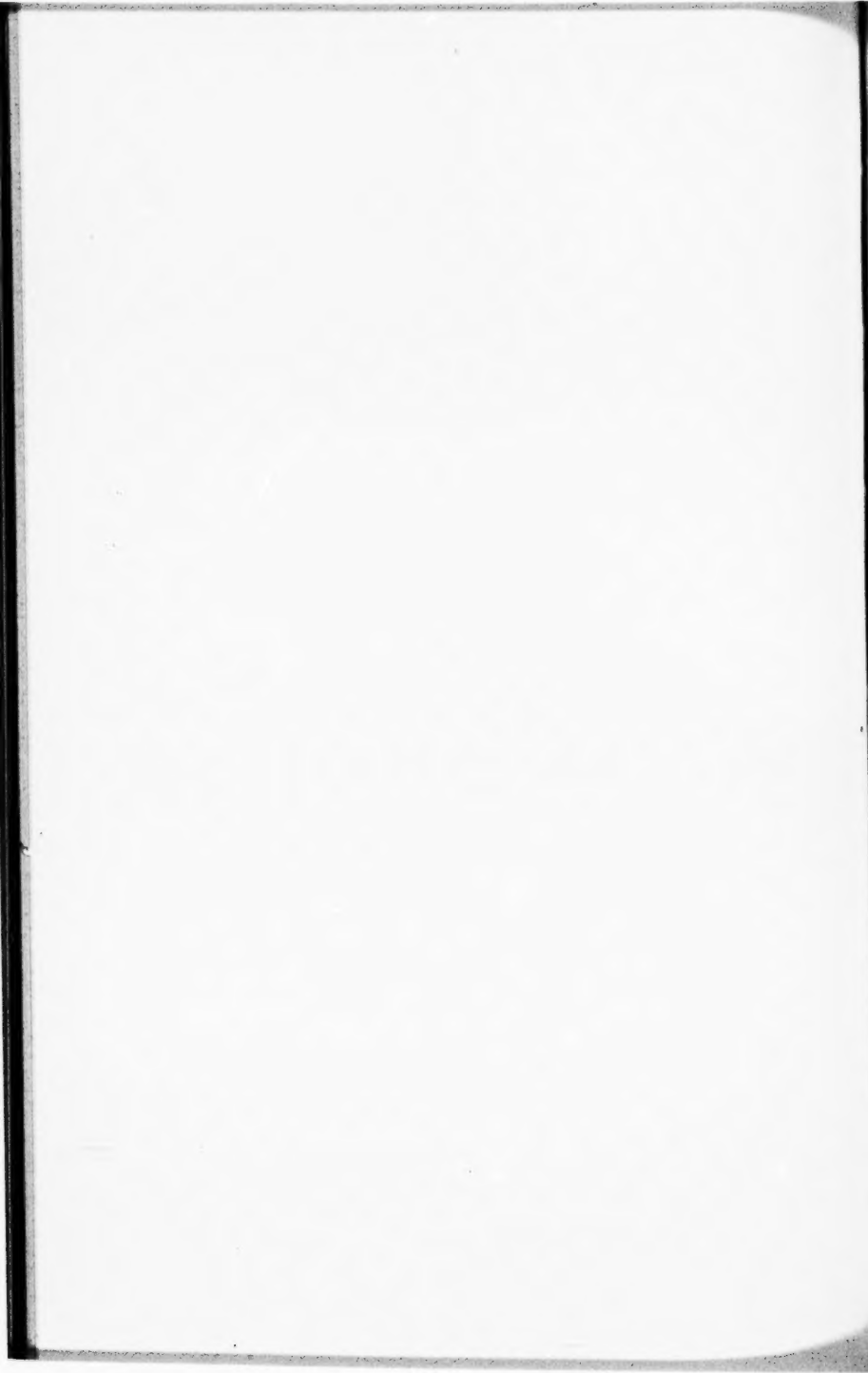
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No.

JAMES M. CRUME,

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vs.

PACIFIC MUTUAL LIFE INSURANCE CO.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

Petitioner obtained four copyrights on four separate books or publications of which he was the author. These four books had a common subject-matter, which was the reorganization of an insolvent or impaired life insurance company, out of its own assets only, and without the contribution of any new capital. Claiming that the Respondent had infringed some or all of these copyrights, Petitioner brought suit in the District Court for the Northern District of Illinois, Eastern Division, where a motion to dismiss was sustained, and the complaint dismissed for want of equity. This action was affirmed by the Circuit Court of Appeals for the Seventh Circuit, the Judges sitting upon that occasion being Circuit Judges Major and Kerner, and District Judge Lindley.

Petitioner's copyrighted books disclosed a plan or method by which an insolvent life insurance company could be reorganized out of its own assets and without the addition of any new capital. Respondent, having been adjudged insolvent by a California court of competent jurisdiction, sought to reorganize by taking the steps described by petitioner, and in its literature distributed to policyholders, creditors, and others in interest, respondent copied much of the material found in petitioner's copyrighted books.

Many points over which there was controversy such as the matter of laches, what was and was not in the public domain, and others, were abandoned in the Circuit Court of Appeals by respondent in its oral argument. These are not herein called to the attention of the Supreme Court, but there is one matter which, so far as petitioner is aware, has never been presented to the Supreme Court, though as the Circuit Court of Appeals explicitly recognized in its opinion, this point had been decided in some other circuits as petitioner contends, but which in the Seventh Circuit, was decided adversely to petitioner, thus presenting a divergence of opinion in different circuits which this Court now has the opportunity to harmonize and rectify.

The Copyright Act (U. S. Code, Title 17, Section 25) enumerates various items of relief available against infringers and in favor of copyright owners, but does not define infringement, leaving that open to the courts for judicial determination and adjudication. The question upon which a review is now sought by petitioner is this: Conceding that the public had the right to take every step and following every idea and every suggestion promulgated in petitioner's copyrighted works, did respondent thereby have the right to copy, publish and republish, and pirate petitioner's copyrighted books? In the Seventh Circuit, petitioner's contention that respondent's conduct

amounts to an infringement is characterized as preposterous; in other circuits petitioner's contention is upheld.

Petitioner, therefore, prays that a writ of certiorari be granted, limited to an inquiry and determination of whether or not respondent's acts amount in law to copy-right infringement.

Respectfully submitted,

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Petitioner.

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PETITIONER'S BRIEF.

STATEMENT.

Petitioner filed a complaint (Trans. 2-6; Rec. 3-9) in the District Court for the Northern District of Illinois seeking relief under the Copyright laws (U. S. Code, Title 17). In accordance with the Copyright Rules, he filed copies of his four copyrighted works (Trans. 36-109; Rec. 32-83), and copies of two alleged infringing publications (Trans. 7-35; Rec. 10-31; Trans. 140-164; Supplemental Rec. 19-26). Defendant below, respondent here, seasonably filed a motion to dismiss (Trans. 129, 130; Rec. 94, 95) which motion was sustained by Judge Barnes and the complaint dismissed (Trans. 132, Rec. 100). The trial judge filed a written opinion or memorandum (Trans. 131; Rec. 98), and, later on, overruled a motion for new trial (Trans. 133; Rec. 105). Since the cause was disposed of on the pleadings, no evidence was taken, and the record is accordingly simple and short. Probably 90 per cent of the printed transcript comprises the exhibits of copyrighted books and the two publications admittedly issued by respondent which petitioner claims to constitute infringement of his works.

Preliminary Suggestions.

Before proceeding to a discussion of the issues involved petitioner will clarify some of those issues by a short resumé of certain historical and actuarial matters which are of more than mere academic interest and which have a direct and important bearing upon the controversy between the parties to this appeal.

The business of life insurance, while not as old as fire or marine insurance, has developed in England ever since the Stuart dynasty and in this country since prior to the American Revolution. From time to time life insurance companies have become insolvent, and have been wound up in various types of liquidations and receiverships. In this country insurance is not commerce (U. S. C. A., Const. Art. 1, Sec. 8, clause 3, note 124), so the Federal Government cannot administer these companies under the commerce clause of the constitution, and, as a matter of legislative policy, has deliberately excluded insurance companies from the operation of the bankruptcy laws. (Bankruptcy act, sec. 4, *In re Peoria Life Ins. Co.*, 75 Fed. (2nd) 777). Thus the wind-up of insolvent insurance companies has been left to the several states, complicated in nearly every instance by the necessity for primary proceedings in the state where the company's charter was issued and ancillary proceedings in every other state where the company was doing business, obviously producing many elements of conflict between states, unnecessary duplication of expense, inequalities between policyholders, and other evils.

When a mercantile or manufacturing business fails, its assets can be turned into money, and the money thus realized distributed pro rata amongst creditors, but the very nature of the business of life insurance makes the wind-up of an insolvent life company, a difficult and complex proceeding, wholly unlike the wind-up and liquidation of other types of business concerns. For example, some living policyholders have paid for their insurance in full, to mature into a death claim only at some indefinite future date. Other policyholders have paid something into the fund, but will become entitled to benefits only upon the happenings of conditions subsequent, such as payment of future premiums, and, while both of these classes of policy-

holders can have their policies evaluated, many policyholders do not want the cash values of their contracts but prefer that the contracts be kept in force because their uninsurability makes it difficult or impossible to procure other insurance elsewhere. Some policyholders, too, have bought and paid for annuities and expect a periodic remittance from the company. To build up an agency corps requires years and involves a company in heavy expense, and if the agency force is allowed to scatter, an asset the value of which cannot be stated in terms of money is irretrievably lost. Other insurance companies have become reinsurers or reinsureds, and must be considered sometimes as debtors and sometimes as creditors. These and many other factors well known to insurance lawyers and actuaries, show that the wind-up of a life insurance company is a proceeding distinctly and emphatically *sui generis*.

As is well known, the income of life companies is derived from two principal sources, payments made by policyholders for premiums and otherwise, and income on investments. The depression of the '30s resulted in a material diminution of investment income, plus a shrinkage in the value of many investments, particularly railroad bonds, certain types of real estate loans, and the like, and the failure of most companies that did go under was due, not to any increase in expenses and claims that had to be met out of current income, but to the fact that current income was insufficient to carry its own burden, plus the additional and unexpected ones of absorbing or making good capital losses due to investment value shrinkage, augmented as it was by the heavy and unprecedented demands made upon the companies by policyholders desiring cash loans or cash surrenders—a condition much like runs on banks. Plaintiff perceived that if the companies in trouble could only have their liabilities readjusted and be left alone they would in time be completely rehabilitated out of their own assets,

and future premiums paid by continuing policyholders, and plaintiff's proposal for each of the four companies which he analyzed and for which he reduced his suggestions to written or printed form and which were copyrighted, had this fundamental idea in view.

Prior to about 1933, the only methods known to wind up a failed life insurance company were to liquidate the company and pay off the various obligations in cash, or to re-insure its risks in some other company, leading to endless squabbles as to whether or not policyholders and claimants were being fairly dealt with, but in any case, the policyholders could realize only what the assets of the failed company would bring, less the inevitable expenses and losses due to the fact that the conversion into cash of the assets was inevitably under the unfavorable conditions of any forced sale or conversion of assets to say nothing of the loss due to the destruction of the business as a going concern. So long as no major company failed the evils attendant upon these forced wind-ups were of only minor consequence and usually did little more than furnish a cogent argument to a prospective policyholder in favor of keeping out of small companies and taking insurance only in the giants.

In the decade 1930-1940, however, there were many failures of life companies. In the trial court alone two life companies were wound up in general chancery receiverships, and in addition, eight or ten Illinois life companies were wound up in the state courts under the Illinois liquidation act of 1925 then in force. Missouri, Iowa, Ohio, Michigan, Kentucky, Louisiana, California, and other states, contributed to the total of life insurance casualties and this epidemic of failures set petitioner to thinking about ways and means of stopping the loss of policyholders and impairment of policy values, inevitably occa-

sioned by the methods of liquidation and reinsurance previously employed.

Petitioner, an insurance actuary and executive of thirty years' experience, having given the matter a great deal of study and attention, wrote, published, and copyrighted four books to show how a failed life insurance company could be *reorganized and rehabilitated* out of its own assets, *without the contribution or investment of any new capital*. The completely novel suggestions embodied in these books are of a Receiver, or Liquidator, of a defunct life insurance company organizing a new mutual type of life insurance company, and paying in the working capital and surplus of the new company out of the assets in his hands as Receiver of the defunct company and then reinsuring the business on an adjusted basis and transferring all the assets of the defunct company into the new company, virtually "lifting it by its own boot straps," from insolvency to solvency without any outside financial aid. His books described not something like a mathematical theorem or logical syllogism, applicable to all cases, but each book was adapted to the necessity of its particular case. For each of four failures, in **Chicago, Peoria, Detroit, and Cincinnati**, respectively, he prepared a mutualization and rehabilitation proposal. These were published and copyrighted, and while there was some matter common to all, each proposal contained some few portions found in it alone and not in the others.

In 1936, the Pacific Mutual Life Insurance Company of California became, or more properly was, adjudged insolvent. It is beyond the scope of this brief to suggest why that company became involved or what was necessary or desirable to rehabilitate the old company, and it suffices to say that the Insurance Commissioner of California, proceeding under a statute of that State, had himself appointed as conservator of the company. In that capacity, he entered

into a contract with a new company (which he organized and for which he subscribed and paid in out of the assets of the old company in his hands, all the capital and a starting paid in surplus fund) bearing the same name as the old minus the clause "of California", whereby the assets of the old company were transferred *in toto* and *en masse* to the new, and the rights of policyholders, claimants, agents, and reinsurers were covered by this contract. The new company, herein respondent, published and circulated many thousands of copies of the plan and of the contract (the statutory term employed in the statute is "made", U. S. C. A. title 17, sec. 25, clause 2), and the plan and contract contained much material, as petitioner will hereinafter show, appropriated from his copyrighted proposals.

PROPOSITIONS OF LAW RELIED UPON AND CITATION OF CASES.

I.

A copy of a "substantial part" of a copyright work constitutes an infringement, and it is not necessary that the whole composition be rifled.

Ansehl v. Puritan Co., 61 Fed. (2nd) 131, 137.

United Dictionary Co. v. Merriam, 208 U. S. 260,
52 L. Ed. 478.

Perris v. Hexamer, 99 U. S. 674, 676.

II.

A plaintiff in a copyright suit is not entitled to be protected in his ideas but is to be protected in his expression of those ideas, and his directions for carrying those ideas into execution.

Ansehl v. Puritan Co., 61 Fed. (2nd) 131, 137, 138.

Holmes v. Hurst, 174 U. S. 82, 86, 43 L. Ed. 904.

Edwards & Deutsch Litho. Co. v. Boorman, 15 Fed.
(2nd) 35, 36 (C. C. A., 7th Cir.).

III.

Copyright may be justly claimed by an author who has taken existing materials from sources common to all writers and arranged and combined them in a new form.

Edwards & Deutsch Litho. Co. v. Boorman, 15 Fed.
(2nd) 35, 36 (C. C. A., 7th Cir.).

Lawrence v. Dana, Fed. Cas. No. 8136.

Emerson v. Davies, Fed. Cas. No. 4,436.

IV.

In deciding the question of infringement, the obvious thing to do is to compare the copyrighted work with the alleged infringement.

Edwards & Deutsch Litho. Co. v. Boorman, 15 Fed. (2nd) 35, 36 (C. C. A., 7th Cir.).

V.

A defendant may appropriate the ideas of a copyrighted work and express them in his own language, but may not copy an author's arrangement of material and language, and thereby create substantially the same composition in substantially the same manner, without subjecting himself to liability for infringement.

Ansehl v. Puritan Co., 61 Fed. (2nd) 131, 138.

VI.

A motion to dismiss the complaint in a copyright suit necessarily concedes that similarities between plaintiff's and defendant's works were the result of use by the defendant of the plaintiff's work, and, therefore, constitute an infringement.

Ansehl v. Puritan Co., 61 Fed. (2nd) 131, 138.

VII.

Many rules of decision applicable in patent cases are likewise applicable in copyright cases.

Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. Ed. 1086.

Caliga v. Inter Ocean Newspaper Co., 215 U. S. 189, 54 L. Ed. 152.

VIII.

In a patent case (*ergo* in copyright ones) "it is the last step that wins."

Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed Wire Fence Co., 143 U. S. 275, 54 L. Ed. 154.

IX.

Anticipation as such can not invalidate a copyright.

Sheldon v. Metro-Goldwyn Corp., 81 Fed. (2nd) 49, 54.

Weil, "American Copyright Law," p. 234.

X.

Unconscious and unintentional plagiarism is actionable just the same as if deliberate and intentional.

Sheldon v. Metro-Goldwyn Corp., 81 Fed. (2nd) 49, 54.

XI.

Under the statute, compendia and derivative works are copyrightable.

U. S. Code, Title 17, sec. 5, note 31.

XII.

Originality in compiling a book does not mean an entirely new conception, but to avoid infringement a new compiler must "start from scratch" and do his own compiling without merely using the words of a copyrighted publication.

Adventures in Good Eating v. Best Places to Eat,
131 Fed. (2nd) 809 (C. C. A., 7th Cir.).

The Question of Infringement.

The really important question presented to the court, is whether or not respondent has infringed petitioner's copyrights. Before proceeding further, petitioner asks the Court to note that, whatever might have been the law under earlier statutes, mere compilations and compendia are now copyrightable (U. S. C. A. title 17, sec. 5, note 8, also sec. 6), and a copyright cannot be invalidated for want of novelty, as in the case of a patent. *Sheldon v. Metro-Goldwyn*, 81 Fed. (2nd) 49, 53. A compilation is subject to copyright even though it consists of material which itself is non-copyrightable. *Jewelers Circular v. Keystone Pub. Co.*, 281 Fed. 83; *Hartfield v. Herzfeld*, 60 Fed. (2nd) 599; *American Code Co. v. Benzinger*, 282 Fed. 829. The purpose of copyrights on compilations is "to prevent a subsequent laborer in the same vineyard from seeking to save time or trouble by copying his predecessor's work." Weil, "American Copyright Law," p. 234. The mere fact that respondent did not know that it was infringing petitioner's copyrights is immaterial for as the Second Circuit Court of Appeals said, in *Sheldon v. Metro-Goldwyn*, 81 F. (2nd) 54, "unconscious plagiarism is actionable quite as much as if deliberate" (Citing cases). Infringement is established by showing that substantial parts of petitioner's work were lifted by appellee (81 Fed. (2nd) 56). Complete identity between the original and the copy is not necessary to establish infringement (*De Montijo v. 20th Century Co.*, 40 Fed. Supp. 133), and the test for determining infringement seems to be whether or not respondent made a "fair use" of petitioner's work (U. S. C. A. title 17, sec. 25, note 30).

Before proceeding to show similarities between the books copyrighted by petitioner and the matter appropriated by the respondent petitioner directs the attention of the Court to the following excerpts from the opinion of the Circuit Court of Appeals for the Eighth Circuit in the relatively recent case of *Ansehl v. Puritan Pharmaceutical Co.*, 61 Fed. (2nd) 131, which involved infringement of a copy-

right on an advertisement. The Court said, at pp. 136, 138:

"The tendency of modern cases is to increase, rather than restrict, the subject matter of copyright. * * * The courts are disposed to extend copyright to any work involving labor or brain skill, without emphasizing originality or literary merit.

"Since the plaintiff charges that the defendants copied his advertisements, it must be assumed that they did unless the two advertisements are so dissimilar as to negate completely that theory." * * * Copyright infringement may be predicated upon "the sequence and similarity of expressive ideas.

"The test is whether one charged with the infringement has made an independent production or made a substantial and unfair use of the complainant's work.

"It is not a question of quantity, but of quality and value; not whether the part appropriated is a literal copy of the original production but whether it is a substantial and material part.

"Paraphrasing or copying with evasion is an infringement, even though there may be little or no conceivable identity between the two.

"Had each of the two advertisements been an original production and their similarity a mere coincidence, there would have been no infringement of the plaintiff's copyright; but since the motion to dismiss concedes that the similarities which have been pointed out were the result of the use by the defendant of the plaintiff's advertisement, it necessarily follows that defendant's advertisement did infringe the plaintiff's copyright."

The case from which the quotation above was taken is one of the cases referred to in the concluding paragraph of Judge Major's opinion as holding what petitioner contends to be the correct rule of law, but which the Seventh Circuit Court of Appeals expressly overruled, evidencing the conflict of authority between two circuits upon the same legal proposition. The opinion said (Trans. 176):

"To hold that an idea, plan, method or art described in a copyright is open to the public but that it can be used only by the employment of different words and

phrases which mean the same thing, borders on the preposterous * * *. Notwithstanding some authorities which support a theory permitting such a result, we think it is wrong and disapprove it."

Still other cases which are out of harmony with Judge Major's opinion are *Hartfield v. Peterson*, 2nd Cir., 91 Fed. (2d) 998, and *Donnelly v. Haber*, 2nd Cir., 43 Fed. Supp. 457.

Comparison of Petitioner's Books and Respondent's Copies.

It is obvious that respondent lifted and pirated verbatim much material and many words and phrases that petitioner used in his copyrighted books in describing the organization of a new mutual type company, the paying-in of working capital by a receiver (conservator, liquidator), out of the assets of a defunct company in the receiver's hands, the transfer of all the assets of the defunct company to a new company, and the reinsurance on an adjusted basis of all the policies of the defunct company by the new company. Petitioner's copyrighted books are "objects of explanation, expression, and direction" not "objects of use". Therefore, petitioner's explanations are properly the subject of copyright and there is infringement by respondent's republication and distribution of these explanations to the world at large. (*Taylor Inst. Co. v. Fawley-Brost Co.*, 138 Fed. 2d 98, 100.)

It can readily be seen that respondent appropriated and followed the key words of petitioner's material, adding some material at one time and place and deleting some material in other times and places to fit the individual situations and to obscure the piracy.

Petitioner, therefore, submits a few excerpts or quotations from his own publications, and parts of respondent's publications which appropriate petitioner's work, making use of the time-honored expedient of parallel columns.

NOTE: The insertion in italics of Old Company and New Company in petitioner's column and the deletions are made for the purpose of easier comparison.

**From
Appellant's Books.**

(Trans. 109; Rec. 88.)

ASSETS OF PEORIA.

Receiver * * * agrees to * * * transfer * * * to the company (*New company*) all the properties of Peoria (*Old company*).

(Trans. 112-113; Rec. 88.)

* * * out of the assets of Peoria (*Old company*) there shall forthwith be * * * transferred to the Company, (*New company*) out of the property now in hand of the Receiver * * * the amount of Two Hundred Thousand Dollars (\$200,000.00) for the purpose of providing the Company (*New company*) with a guarantee capital. * * *

(Trans. 112; Rec. 88.)

THE MUTUAL COMPANY.

The Company (*New company*) shall receive * * * out of the first assets transferred from the Receiver to the Company, (*New company*) a guarantee capital paid in and surplus paid in, in the amounts of two hundred thousand dollars (\$200,000) and eight hundred thousand dollars (\$800,000), respectively. * * *

**From
Appellee's Copies.**

(Trans. 9; Rec. 14.)

TRANSFER OF ASSETS.

The Conservator agrees * * * to * * * transfer * * * to the New Company, the properties of the Old Company;

(Trans. 12-13; Rec. 16.)

The New Company agrees * * * to allocate * * * that portion of the assets conveyed * * * by the Conservator (other than the Three Million Dollars (\$3,000,000) transferred to the New Company for its capital stock). * * * The said Three Million Dollars (\$3,000,000) transferred to the New Company for its capital stock constitutes and shall constitute the capital and paid-in surplus of the New Company;

(Trans. 142; Rec. 21.)

The Commissioner will subscribe for and purchase with assets * * * held by him as liquidator of the Old Company all the authorized stock of the New Company for \$3,000,000, which will thus establish the New Company with a paid-in capital of \$1,000,000 and a paid-in surplus of \$2,000,000.

(Trans. 110-111; Rec. 88.)

Any such policyholder who shall notify the Company (*New company*) of the Receiver in writing within one month after the date of this agreement that he does not elect to continue his policy with the Company (*New company*) under the terms hereof, shall have refunded such premium or premiums as may have been paid to the Receivers for the account of such policyholder on any such policy, less the net cost of term insurance at the attained age of the insured, for the period from the due date of the premiums paid to the Receiver, to the date of the receipt of notice by the Company (*New company*) from the policyholder of his election to have such premium refunded. * * *

(Trans. 38; Rec. 35-36.)

A NEW MUTUAL COMPANY, (hereinafter referred to as the MUTUAL COMPANY) shall be organized as a purely mutual legal reserve life insurance company, under the name of DETROIT MUTUAL LIFE INSURANCE COMPANY, or such other name as may be selected and allowed.

THE PLAN SHALL PROVIDE that the MUTUAL COMPANY as a consideration of the assumption and payment of certain liabilities of the OLD COMPANY, and for a continuation of insurance policies of the OLD COMPANY on a readjusted basis, shall acquire assets of the OLD COMPANY suf-

(Trans. 10; Rec. 14.)

If any policyholder of the Old Company whose policy may be reinsured or assumed hereunder shall have paid his premium thereon to the Conservator subsequent to the effective date of this agreement, and shall thereafter elect to reject reinsurance and assumption of his such policy hereunder; and if the Court shall direct the Conservator or Liquidator to return said premium (or the net premium or premiums less charge for insurance service or collection charge or otherwise); then and in those events the New Company shall repay to the Conservator or Liquidator, on demand, said premium, or so much thereof as the Court may have ordered returned by the Conservator or Liquidator, as aforesaid.

(Trans. 142; Rec. 21.)

The Commissioner, as liquidator, and as such vested with title to all of the properties and assets of the Company, will organize a new corporation (hereinafter referred to as the 'New Company') under the laws of California for the purpose of conducting a life and accident and health insurance business. The New Company will have an authorized capital of \$1,000,000 consisting of 10,000 shares of the par value of \$100 per share, all of one class. Although a stock company, it will be authorized to issue participating policies on a legal reserve basis. The directors of the New Com-

ficient to meet the policy and other liabilities assumed and an operating capital or surplus fund sufficient to qualify it under the laws of the State of Michigan, to transact the business of life insurance on a mutual legal reserve basis.

THE OPERATING CAPITAL OR SURPLUS FUND so acquired by the NEW MUTUAL COMPANY will be entirely owned by the policyholders of the OLD COMPANY, who become the policyholders of the NEW MUTUAL COMPANY, * * *

(Trans. 65; Rec. 56.)

A NEW COMPANY is to be organized under the laws of the State of Illinois under the name 'ILLINOIS MUTUAL LIFE INSURANCE COMPANY,' or such other name as may be selected or allowed by the Director of Trade and Commerce of the State of Illinois (hereinafter called the NEW COMPANY).

It is intended to vest in the NEW COMPANY the business of the OLD COMPANY, and all of the properties and assets of the OLD COMPANY, as may be ultimately determined.

(Trans. 112-113; Rec. 88.)

Immediately upon the execution of this agreement out of the assets of Peoria there shall forthwith be paid and transferred to the Company, out of

pany will be selected and approved by the Commissioner. The Commissioner will subscribe for and purchase with assets or funds held by him as liquidator of the Old Company all of the authorized stock of the New Company for \$3,000,000, which will thus establish the New Company with a paid-in capital of \$1,000,000 and a paid-in surplus of \$2,000,000. The stock of the New Company thus issued to the Commissioner as liquidator of the Old Company will be held by the Commissioner subject to the ultimate mutualization of the New Company, as hereinafter provided.

(Trans. 142-143; Rec. 21.)

All of the properties and assets formerly owned by the Old Company and held by the Commissioner as its liquidator will be transferred and conveyed to the New Company, with the exception of the stock of the New Company * * *.

(Trans. 8; Rec. 13.)

"Properties of the Old Company" shall mean * * * all * * * assets * * * owned by the Old Company at the time of the appointment of the Con-

the property now in the hands of the Receiver cash and/or securities, and/or mortgages in the amount of Two Hundred Thousand Dollars (\$200,000.00) for the purpose of providing the Company with a guarantee capital as required by the laws and statutes of the state of Illinois for the operation of a legal reserve mutual life insurance company, also having authority to transact the business of accident and health insurance.

(Trans. 112; Rec. 88.)

THE MUTUAL COMPANY.

The Company (*New Company*) has been organized as a mutual legal reserve life insurance company under the laws of the state of Illinois for the purpose of assuming and continuing the policies of Peoria, and for the purpose of conserving the assets of Peoria for distribution to claimants under policies, and pursuant to and in consideration of such undertaking the Company shall receive and be paid out of the first assets transferred from the Receiver to the Company, a guarantee capital paid in and surplus paid in, in the amounts of two hundred thousand dollars (\$200,000) and eight hundred thousand dollars (\$800,000), respectively, as herein-after provided.

servator which shall not have been applied by him against his subscription for stock of the New Company * * * plus all property acquired by the Conservator * * * except (a) the stock of the New Company held by him, * * *.

(Trans. 145; Rec. 22.)

MUTUALIZATION OF NEW COMPANY.

As soon as legally possible, the New Company and the Commissioner, as the holder of all of the outstanding stock of the New Company, shall prepare and present to the policyholders of the New Company a plan for its voluntary mutualization in accordance with the laws of the State of California, as then in effect. Such mutualization plan shall contain such terms and provisions not inconsistent with this plan and agreement, as may be required by law or approved by the Commissioner and the New Company. The purchase price paid by the New Company for the acquisition of its outstanding stock pursuant to such mutualization plan to the extent not required for the satisfaction of item (c) of paragraph 4 above shall be repaid to the New Company.

(Trans. 103-104; Rec. 86.)

(Trans. 155; Rec. 27.)

**MORATORIUM ON CASH AND LOAN
VALUES OF POLICIES, COUPON
AND DIVIDEND ADDITIONS AND
ACCUMULATIONS? SUPPLE-
MENTARY CONTRACTS AND
TRUST FUND AGREEMENTS
FOR MONEY LEFT IN TRUST.**

MORATORIUM.

The reinsurance and assumption of obligations herein provided for shall further be subject to the condition and limitation that until December 31st, 1938, or for such lesser period as may be prescribed by the Board of Directors of the Company, the cash surrender values and cash loan values of any Peoria policy * * * shall not be available to the holder of such policies * * * assumed hereunder (except that part of any such value as may be applied to the payment of premiums on any policy on which the value is used, or on any other policy or policies insuring the same life).

This provision shall not apply to any increase in the cash value or the loan value created out of premiums, or parts of premiums, or policy loan payments, paid in cash to, or received by, the Company or the Receiver subsequent to the effective date hereof. * * *

(Trans. 99; Rec. 85.)

The reinsurance and assumption of obligations by the New Company herein provided for are subject to the condition that the new Company shall not be required, prior to sixty (60) days, and such additional period as may be determined by the Commissioner, from and after the effective date of this agreement, to make policy loans (except for the purpose of paying premiums on the same policy or on additional policies issued on the same life), or to pay cash surrender values.

This provision, however, shall not apply to any increase in values that are accumulated from premium payments or loan repayments which are received subsequent to the date of liquidation.

(Trans. 11; Rec. 15.)

**REINSTATEMENT OF LAPSED
POLICIES.**

**REINSTATEMENT OF LAPSED
POLICIES.**

The Company (*New company*) will reinstate and assume any Peoria policy lapsed

The New Company will also reinstate, during the life-time of the insured * * * without

on or since the effective date hereof, provided written application for reinstatement is made while living, by the policyholder. * * * except that no evidence of insurability shall be required. Such right of reinstatement of any policy shall continue until two months after the date of this agreement.

* * * Subject to the payment of any premium or part of any premium, due and unpaid. * * * Upon such reinstatement of any lapsed Peoria policy, it shall for all purposes be treated the same as if it had been in force on the effective date hereof.

(Trans. 110; Rec. 88.)

* * * the Receiver shall likewise transfer and deliver to the Company (*New company*), the full amount of all premiums paid to the Receiver, for the account of policies of Peoria.
* * *

(Trans. 110; Rec. 88.)

All premiums on any policy assumed hereunder paid to the Receiver on or after the effective date hereof shall be credited by the Company (*New Company*) to the account of such respective policy or policies.

evidence of insurability, any of the policies reinsured and assumed * * * which have lapsed since the effective date of this agreement, upon written application therefor by the insured and the payment of all premiums in arrears, if such application is made * * * within seventy-five (75) days after the entry of the order of the Court approving this agreement. Upon the reinstatement of such lapsed policy it shall, for all purposes, be treated * * * the same as if it had been in force on the effective date of this agreement. * * *

(Trans. 9-10; Rec. 14.)

The Conservator shall transfer and deliver to the New Company the full amount of all premiums on any policy * * * which have been paid to the Conservator.

(Trans. 9-10; Rec. 14.)

* * * all premiums on any policy * * * assumed hereunder * * * paid to the Conservator on or after the effective date of this agreement. * * * the New Company shall credit the holder of such policy with the payment of such premiums accordingly. * * *

Conclusion.

The final decree of the District Court was upon a motion to dismiss, and for the purposes of that motion, respondent admitted the truth of every well-pleaded allegation in the complaint including, of course, the averments of par. 6 of the complaint (Trans. 4; Rec. 6) that respondent had copied and pirated petitioner's books. Rule 9, F. R. C. P. clause *d*, provides that in pleading an official act it is sufficient to aver that the act was done in compliance with law. Petitioner, therefore, did not have to allege each and every preliminary step taken or performed by him, such as citizenship, payment of fees, deposit of copies in the Library of Congress, etc., for it will be presumed, under this rule and clause, that when the Register of Copyrights issued the certificates, the law was fully complied with, not only by the Register of Copyrights but by the appellant too. These same presumptions would have applied under the old equity rules of 1912, as well as under the present Federal Rules of Civil Procedure.

In the District Court and in the Circuit Court of Appeals respondent contended (and presumably will again do so in this Court), that it was entitled to infringe petitioner's copyrights with impunity merely because the infringing matter had to be submitted to a California court for judicial approval. This proposition of law is so preposterous as to deserve no comment. It is true that law reports, syllabi written by judges, and some other items can not be copyrighted (U. S. C. A. title 17, sec. 6, notes 2, 3, 4), but there are no decisions and probably never will be any holding that something which a litigant (not a court) happens to write is immune from the operation of the Copyright Act.

The District Court's opinion intimated that the real infringer was someone other than respondent, possibly Car-

penter, the Insurance Commissioner of California, who entered into a certain contract with respondent, but lost sight of the fact that it was respondent, not the Commissioner, who published and distributed several hundred thousand copies of what petitioner claims to be infringements of his copyrights.

Conceding, moreover, that respondent could have prepared its contract or other legal documents, and filed the same in court, and that parties in interest could have consulted the court records or obtained copies from the Clerk, and that by so doing respondent would not have infringed anybody's copyrights; but when respondent published many hundreds of thousands of copies of these contracts in its magazine and distributed them to the world at large, respondent did thereby infringe.

Petitioner does not now and never did contend that when respondent was adjudged insolvent, it was precluded from taking every step and following every idea and every suggestion promulgated in petitioner's copyrighted works. Respondent had the right to reorganize and to do each and every act which the copyrighted works even remotely suggest. That is one thing, but it was an entirely different thing when respondent copied, pirated and published what petitioner had written. Respondent also had the right to prepare, publish, and use various reinsurance contracts, but had no right to employ petitioner's material. The situation in this respect is exactly like that presented in the very recent case of *Adventures in Good Eating v. Best Places to Eat*, 131 Fed. (2nd) 809, 811, in which the opinion said:

"In reviewing this finding we have very carefully examined the two books. * * * The books bear a resemblance to each other, and the **phraseology in many** instances is strikingly similar. Defendants seek to explain the similarity in wording as the logical result of the copying by both plaintiff and defendants of menus supplied by the restaurateurs listed in the books—that naturally and inevitably the same listing

of prices, of specialties in food, and unusual features of the respective places would occur when the menus were used as source material in making up the copy. We are not convinced that this suggestion would explain the existence of such close and parallel wording, and especially would it not explain the substantially same selection of places listed in the respective books."

For respondent to have distributed thousands of copies of its own "Rehabilitation Agreement" and its own "Pacific Mutual News" was a clear violation of petitioner's copyrights. That, and nothing else, is what this suit is about.

Petitioner contends that if a doctor should write a book telling how to treat and cure a certain disease, other doctors may administer the same remedies and follow the same treatment set forth in the book; but further contends that no one else has the right to pirate and publish the book itself just because the public is free to follow the book's directions. The same thing is true, for example, of a book on cookery, on the manufacture of a chemical, on the performance of a metallurgical process, on the trial of a lawsuit, or on any one of countless other human activities. Freedom to do what such books direct is not freedom to copy the books themselves—at least it was not until the courts below so held in this case.

Books, after all, are only collections of words, and a copyright protects the arrangement of words selected and used by an author. The right to do what the book tells is one thing; the right to use the words as arranged by the author is another and entirely different thing; and the right to do the first thing does not confer the right to do the second.

The case of *Baker v. Selden*, 101 U. S. 99 (Trans. 174), is not in point, because that litigation dealt with account books, prepared and ruled in a particular manner, but did

not in any manner deal with *words*, as in the case at bar. *Baker v. Selden* involved a mechanical art, not literature or literary property. If there was any protection at all available to the plaintiff in that case, it was under the patent laws, not the statutes then in force pertaining to copyrights, and it was not contended that the alleged infringer used any words or arrangements of words of which the plaintiff therein was the author. The present litigation deals wholly and exclusively with word material—something entirely different from charts of ruled lines (as in *Taylor Inst. Co. v. Fawley-Brost Co.*, 139 Fed. 2d 98, cited in Judge Major's opinion), or with ledgers, journals, or other bookkeeping devices (as in *Baker v. Selden*). Nevertheless, in the Taylor case Judge Major clearly recognized that objects of explanation and direction as distinguished from objects of use, are copyrightable and this is precisely the category into which petitioner's copyrighted works belong.

As Mr. Justice Brown observed in the famous case of *Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed Wire Fence Co.*, 143 U. S. 275, 36 L. Ed. 154, 158, in the law of patents, "it is the last step that wins," citing and relying upon such cases as *Webster Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177, *Consolidated S. U. Co. v. Crosby*, 113 U. S. 157, 179, 28 L. Ed. 939, 946, and *Smith v. Goodyear*, 93 U. S. 486, 495, 23 L. Ed. 952. In the instant case, therefore petitioner made the last step when he wrote the books showing the world how to rehabilitate an insolvent life insurance company out of its own assets. Respondent, in preparing its own plans, proposals, and contracts copied and pirated much of what is found in petitioner's four copyrighted publications, being induced to do so in all probability by the fact that petitioner was the first one to express in words these formulae for thus reorganizing an insolvent life insurance company. Obviously, petitioner took

the last step and the winning one when he expressed those ideas in words, and when respondent chose to use those words in its own printed matter, the result was an infringement of petitioner's copyrights for which infringement respondent should be compelled to answer and account.

The judgment of the Circuit Court of Appeals affirming the order of the District Court should be reversed and the cause remanded to the courts below for further proceedings.

Respectfully submitted,

E. R. ELLIOTT,

HARRY C. ALBERTS,

Appellant's Attorneys.



(22)

FILED
MAY 25 1944

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 953

JAMES M. CRUME,

Petitioner,

vs.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**BRIEF AND ARGUMENT OF RESPONDENT, PACIFIC
MUTUAL LIFE INSURANCE COMPANY, IN OPPO-
SITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.**

ORVILLE J. TAYLOR,

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Counsel for Respondent.



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*To the Honorable, the Chief Justice, and the Associate
Justices, of the Supreme Court of the United States:*

Pacific Mutual Life Insurance Company, respondent to the petition of James M. Crume, petitioner herein, for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in this matter, opposes the granting of the writ; and in support of such opposition, we respectfully submit the following brief and argument in its behalf.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in this cause is reported in 140 F. (2d) at page 182. It is also set forth in the Transcript at pages 172 to 177.

Judge Barnes of the District Court of the United States for the Northern District of Illinois, Eastern Division, filed a memorandum opinion which is set forth in the Transcript at page 131.

Statement of Facts.

Since neither the petition nor petitioner's brief contains a complete and concise statement of the facts of the case, we believe it desirable to set forth a brief outline of the important facts.

The claim in this case was one of copyright infringement. The case was disposed of in the District Court on the pleadings. The petitioner filed a complaint together with exhibits which consisted of his four copyrighted pamphlets and copies of two alleged infringing publications. The respondent filed a motion to dismiss which was sustained. Petitioner's motion for a new trial was denied. On appeal to the Circuit Court of Appeals for the Seventh Circuit the orders of the District Court sustaining respondent's motion to dismiss and denying petitioner's motion for a new trial were affirmed.

The complaint (Tr. 2 to 6) alleged that the petitioner is the author of four books, and that he caused each of said books to be copyrighted in conformity with the copyright statute. The titles of petitioner's books and the respective

dates on which petitioner caused them to be copyrighted, are set forth in the complaint as follows (Tr. 3):

Title	Date
Illinois Life Insurance Company Mutualization and Readjustment Plan	February 3, 1933
Detroit Life Insurance Company Mutualization and Readjustment Plan	July 10, 1935
Federal Union Life Insurance Company Tentative Mutualization and Readjustment Plan	August 22, 1936
Mutualization and Readjustment Plan Agreement	August 17, 1936

The complaint further alleged that the petitioner notified or caused the respondent to be notified in writing of its infringement of petitioner's rights as copyright proprietor (Tr. 4).

The complaint alleged that the respondent caused to be published, printed and distributed a certain instrument called a "Rehabilitation and Reinsurance Agreement," dated as of July 22, 1936, whereby the respondent appropriated and pirated many clauses, paragraphs and parts of the books upon which petitioner had previously secured copyrights. It alleged that respondent printed or caused to be printed copies of said agreement and circulated or caused the same to be circulated throughout the United States after petitioner's last copyright had been obtained. It alleged that the first infringement was committed by the respondent in causing said "Rehabilitation and Reinsurance Agreement" to be published in the August, 1936 issue of respondent's trade journal called "Pacific Mutual News," and that respondent distributed a large number of copies of said issue after petitioner's last copyright had been secured (Tr. 4).

The complaint alleged that the respondent also printed and distributed additional infringing copies of said in-

fringing "Rehabilitation and Reinsurance Agreement" by publishing the same in pamphlet form, redating the same as of December 4, 1936, and caused a large number of copies of said pamphlet to be distributed throughout the United States (Tr. 4).

The complaint further alleged on information and belief that respondent published, printed and distributed not less than 750,000 copies of said "Rehabilitation and Reinsurance Agreement" on and after the date of petitioner's latest copyright, that respondent had on hand a great number of copies of said agreement, that respondent intended to and unless restrained by the court would continue to distribute copies of said agreement, and that each copy so printed and distributed by the respondent infringed each of petitioner's four copyrights (Tr. 4, 5).

The complaint prayed that the court enjoin the respondent from further distributing any copies of the "Rehabilitation and Reinsurance Agreement," that respondent be required to deliver up all copies on hand to be impounded during the pendency of the cause, that an accounting be taken and the number of copies published, printed and distributed by the respondent be ascertained and determined and that judgment be entered against the respondent for the statutory sum of One Dollar per copy for each copy found to have been made by the respondent, and at the statutory rate for each of the four copyrights found to be infringed by the respondent (Tr. 5, 6).

A confusion in the complaint between an earlier plan for the reorganization and rehabilitation of The Pacific Mutual Life Insurance Company of California which was not adopted in the statutory proceeding in California and a later plan of reorganization and rehabilitation which was adopted is clarified by a stipulation of the parties (Tr. 139, 140).

In accordance with Copyright Rule No. 2 of this court, the petitioner filed as exhibits to his complaint a copy of each of his four copyrighted works (Tr. 36-129) and copies of two alleged infringing works (Tr. 7-35; 140-164). These required exhibits to the complaint were, of course, a part of the complaint for the purpose of the motion to dismiss.

An examination of petitioner's four pamphlets (Tr. 36-129) discloses that each of them is a plan, or an outline of a plan, for the reorganization of an insolvent life insurance company through mutualization and readjustment of liabilities. From the content of one of petitioner's pamphlets (Illinois Life Insurance Company Mutualization and Readjustment Plan) it appears that it was prepared for a policyholders' protective committee (Tr. 61, 62).

Some of the important facts which appear from the alleged infringing publications are:

(a) that they were agreements between the respondent corporation and the Insurance Commissioner of the State of California, acting as statutory conservator of a predecessor company (Tr. 7, 8, 145, 146);

(b) that they were promulgated by the Insurance Commissioner of the State of California, acting as statutory conservator of a predecessor company, for the purpose of reorganizing and rehabilitating the business and assets of a predecessor company (Tr. 7-35, 145-164);

(c) that they were prepared for submission to, and approval by, the Superior Court of California, in a proceeding there pending pursuant to the California Insurance Code (Tr. 8, 34, 35, 141, 142);

(d) that they were, in substance, plans providing for the organization of the respondent corporation (Tr. 7-35; 145-164).

Respondent filed its motion (Tr. 129, 130) to dismiss petitioner's action on the following grounds:

(a) that the complaint, together with the exhibits, fails to state a claim upon which relief can be granted;

(b) that the alleged infringing works are not a copy, in whole or in part, of any of the works which petitioner registered in the Copyright Office;

(c) that each of the works which petitioner registered in the Copyright Office is nothing more than a proposed plan, or the outline of a proposed plan, for the reorganization of an insurance company, and is not copyrightable;

(d) that each of the works which petitioner registered in the Copyright Office does nothing more than set forth a plan which is common property and is, therefore, not copyrightable;

(e) that each of the works which petitioner registered in the Copyright Office does nothing more than set forth matters in the public domain, and is, therefore, not copyrightable;

(f) that none of the works which petitioner registered in the Copyright Office is original with the plaintiff and, therefore, none of them is copyrightable;

(g) that two of petitioner's four works were registered in the Copyright Office subsequent to the publication of the alleged infringing works;

(h) that petitioner's cause of action, if any, does not lie against the respondent but lies against Samuel L. Carpenter, Jr., who, as Insurance Commissioner of the State of California in the year 1936, promulgated and published the alleged infringing works pursuant to the provisions of the California Insurance Code and pursuant to orders of the Superior Court of California in and for the County of Los Angeles.

Respondent's motion also asserted that petitioner's cause of action, if any, was barred by laches (Tr. 130).

The petition filed in this court by the petitioner states (page 2): "Many points over which there was controversy such as the matter of laches, what was and was not in the

public domain, and others, were abandoned in the Circuit Court of Appeals by respondent in its oral argument." We are completely unable to understand or explain that statement, as the respondent has at no time abandoned any of the points made by it in its motion to dismiss.

SUMMARY OF ARGUMENT.

The question decided by the Circuit Court of Appeals in this case was whether the alleged infringing works do in fact infringe upon any rights which the petitioner may have obtained by registering his four pamphlets in the Copyright Office.

Both the District Court and the Circuit Court of Appeals found that there had been no substantial copying or use of petitioner's means of expression and, accordingly, no infringement had occurred.

A comparison of the exhibits in this case establishes, without more, the correctness of the decision of the Circuit Court of Appeals denying petitioner's claim of infringement, and the decision is not in conflict with the decision of any other circuit court of appeals on the same matter.

ARGUMENT.

I.

Introductory Statement.

Petitioner states that the question upon which he seeks a review by this court is (Petitioner's petition, p. 2):

"Conceding that the public had the right to take every step and following every idea and every suggestion promulgated in petitioner's copyrighted works, did respondent thereby have the right to copy, publish, republish, and pirate petitioner's copyrighted books?"

That is a wholly gratuitous statement of the question. It assumes copying and infringement and utterly disregards the basic issue in the case and the necessary prior question which is: Was there any copying or imitating constituting infringement?

The right to copy cannot be in issue unless there is some evidence of copying. In this case there is none.

The question presented by the petition is more accurately stated on page 14 of petitioner's brief, in the following manner:

"The really important question presented to the court, is whether or not respondent has infringed petitioner's copyrights."

Both the District Court and the Circuit Court of Appeals found that there was no infringement.

II.

A Plan, System or Idea Is Not Copyrightable.

While the petitioner professes to admit that he cannot have a copyright in a plan, system or idea (Petitioner's brief, p. 24), he repeatedly asserts the claim that he is the originator of a method of reorganizing life insurance companies and endeavors to attach to that claim some right under the copyright laws (Petitioner's brief, pp. 2, 6-8). It is appropriate, therefore, to review briefly the authorities on that subject.

The method of reorganizing life insurance companies by mutualization and readjustment of liabilities is, in itself, nothing more than an intellectual concept. It is a plan, system, or idea, and, as such, is not subject to copyright.

In the case of *Baker v. Selden*, 101 U. S. 99, this court held that a copyright upon a book explaining a system of bookkeeping did not protect the copyright owner from the use of the system by another.

In *Dorsey v. Old Surety Life Ins. Co.*, 98 F. (2d) 872 (C. C. A. 10th) the court held that copyrights obtained by the plaintiff upon three forms of life insurance policies could not restrict the right of the defendant to use the plans of insurance embraced in the copyrighted policies.

In *Burk v. Johnson*, 146 Fed. 209 (C. C. A. 8th), it was held that the copyright of a pamphlet containing articles of association and by-laws of a mutual burial association did not protect the system, as a system, so as to confer on the person owning the copyright the exclusive right to organize associations under the plan.

In *Long v. Jordan*, 29 F. Supp. 287, it was held that a copyright expounding a system of old age pensions could not prevent the use of the system by others.

In *Affiliated Enterprises, Inc. v. Gruber*, 86 F. (2d) 958 (C. C. A. 1st), it was held that a "bank night" system which plaintiff originated and furnished to motion picture theatres by licenses could not be copyrighted.

Under these authorities, even if the petitioner were the originator of the plan or idea of reorganizing life insurance companies by mutualization and readjustment of liabilities, the copyright laws would give him no exclusive right in that plan or idea.

III.

The Reorganization Devices of Mutualization and Readjustment of Liabilities Are Matters Within the Public Domain.

While the fact that a plan, system or idea is not subject to copyright is a complete answer to any contention that petitioner has a copyright on the reorganization method contained in his pamphlets, there is another equally compelling answer, namely, that neither of the devices used in his pamphlets is original with the petitioner and that both are matters in the public domain.

The principle that matters in the public domain are not copyrightable does not require discussion (*Becker v. Loew's, Inc.*, 133 F. (2d) 889, 891, C. C. A. 7th; *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, 24, C. C. A. 9th).

It is apparent from reported cases alone, that the reorganization device of mutualization and the reorganization device of liability readjustment did not have their origin with petitioner's pamphlets.

An early case involving the mutualization of a stock life insurance company is the case of *Royal Trust Co. v. Equitable Life Assurance Society of the United States*,

247 Fed. 437, decided by the Circuit Court of Appeals for the Second Circuit in 1917. In that case the court pointed out that the statutes of New York have authorized the conversion of stock life insurance corporations into mutual corporations since 1906 (247 Fed. at page 439).

The numerous cases involving the reorganization of the National Surety Company by a readjustment of liabilities show clearly that the device of reorganizing insurance companies by that method preceded petitioner's pamphlets. *In re National Surety Co.*, 268 N. Y. S. 88 (1933), affirmed without opinion under the name of *People by Van Schaick v. National Surety Co.*, 264 N. Y. 473, 191 N. E. 521; *National Surety Corporation v. Nantz*, 262 Ky. 413, 90 S. W. (2d) 385; *Thrower v. Kistler*, 14 F. Supp. 217.

To support a valid copyright a work must be original. The reorganization devices of mutualization and readjustment of liabilities are a part of the fund of knowledge of mankind and are common property. As such, they are within the public domain and cannot, either separately or in combination, be appropriated to a private domain by the use of the copyright law.

IV.

There Has Been No Infringement Because There Has Been No Copying.

Assuming that there is some zone within which the petitioner obtained exclusive rights under the copyright law, the most that the petitioner could have procured by registering his pamphlets would be an exclusive right in his original means of expression. Even on that assumption, there has been no infringement of petitioner's rights because there has been no copying.

It is a fundamental of copyright law that there can be no infringement unless there has been copying, in whole or in part, of the copyrighted work (*Becker v. Loew's, Inc.*, 133 F. (2d) 889, 892, C. C. A. 7th).

There could be infringement, of course, without literal copying of the whole of petitioner's work. But there can be no infringement unless there has been some substantial imitation, duplication, plagiarism or reproduction (Admur, Copyright Law and Practice, 1936, pp. 656-682).

In this case a comparison of the exhibits demonstrates that there is no similarity of language or form between either of the alleged infringing works and any of the petitioner's four pamphlets.

On this fundamental point of showing some copying—or even similarity—by a comparison of the exhibits, petitioner's brief does nothing more than set forth six pages of parallel columns (Petitioner's brief, pp. 17-22), without comment or discussion except for the gratuitous introductory conclusion that respondent lifted and pirated verbatim much material and many words and phrases from petitioner's copyrighted books (Petitioner's brief, p. 16).

From an examination of this material in column form, even as presented in petitioner's brief, it is plain that there is no similarity or resemblance which approaches copying. But it is particularly significant that in his efforts to show a similarity, and for the asserted purpose of "easier comparison" (Petitioner's brief, p. 16), petitioner has so tortured some of his illustrative paragraphs by omissions and deletions that the excerpts set forth in his brief bear little or no resemblance to the actual text contained in the transcript and record.

Petitioner's desperation is made evident by an examination of the *full* text of the first and second illustrative excerpts used in petitioner's brief (Petitioner's brief, p. 17). The full text of the first illustrative excerpts is:

**Full Text of First Illustrative Excerpts Used in
Petitioner's Brief.**

From

Petitioner's Pamphlet
(Tr. 109)

“Receiver, in consideration of the aforesaid reinsurance and assumption, and in consideration of all the mutual covenants and agreements herein contained, agrees to, and does hereby, sell, transfer, assign, set over and convey, and will, as soon as the necessary steps can be practicably taken, deliver to the Company all the properties of Peoria, real, personal and mixed (including stock of corporations owned by Peoria and properties held in the name of others for Peoria) including all its rights and choses in action, all its due, uncollected and deferred premiums, all of its policy loans, premium lien notes and all other notes, whether given for the first or second or subsequent years' premium, and whether payable to Peoria, its agents, or otherwise, and all other policy indebtedness of any nature whatsoever; bills and accounts receivable, agents' debit balances, premiums to become due in the future, interest and rents due and secured, surety bonds, fire and casualty insurance policies, stocks, bonds, furniture and fixtures, stationery, supplies, contracts of every nature and description; all of its defenses against claims which may be set up against it, or which may arise out of the aforesaid reinsurance or assumption, or out of any transaction connected with any part of the business

From

Alleged Infringing Work
(Tr. 9)

“The Conservator agrees, by appropriate instrument of conveyance, to sell, assign, convey, release, transfer, set over, and deliver, to the New Company, the properties of the Old Company; and to execute any and all further documents or instruments as may be reasonably necessary to effectuate and confirm the title of the New Company thereto.”

From
Petitioner's Pamphlet
(Tr. 109)

of Peoria; all records, except the stock books, minutes of the stockholders' and directors' meetings (but the New Company shall have access to same) all leases documents, files, cash on hand and/or on deposit, and all other assets of every nature, kind and description, tangible and intangible, whether herein referred to or not, whereof said Peoria and/or Receiver in that capacity, may be possessed or whereunder it and/or they may have rights or claims, except stock owned or held in any failed banking institution, and except such assets as may be withheld by order of the Court for special distribution to policyholders or contract holders of Peoria dissenting to this agreement, or to other creditors of Peoria."

From
Alleged Infringing Work
(Tr. 9)

From a comparison of the full text of the two excerpts above quoted it is readily apparent that their language is similar only in the fact that they contain in common several words customarily found in legal documents. Apparently petitioner bases his charge of appropriation upon the use of several basic legal terms such as "agrees," "transfer," and "properties".

Petitioner's second illustration of verbatim pirating is likewise tortured by omissions and deletions (Petitioner's brief, p. 17). The full text of the second illustrative excerpts is:

Full Text of Second Illustrative Excerpts Used in Petitioner's Brief.

From

Petitioner's Pamphlet
(Tr. 112, 113)

"Immediately upon the execution of this agreement out of the assets of Peoria there shall forthwith be paid and transferred to the Company, out of the property now in the hands of the Receiver cash and/or securities, and/or mortgages in the amount of Two Hundred Thousand Dollars (\$200,000.00) for the purpose of providing the Company with a guarantee capital as required by the laws and statutes of the State of Illinois for the operation of a legal reserve mutual life insurance company, also having authority to transact the business of accident and health insurance."

From

Alleged Infringing Work
(Tr. 12, 13)

"The New Company agrees to establish a separate department for Participating Life Insurance, and to allocate thereto specifically or in tenancy in common that portion of the assets conveyed to it by the Conservator (other than the Three Million Dollars (\$3,000,000) transferred to the New Company for its capital stock) in the ratio in which assets appearing on the books of the Life Department of the Old Company were credited to the Participating Life Department of the Old Company on its books as of July 22, 1936, subject to such changes as may have been made therein in the ordinary course of the operations of the business of the Old Company by the Conservator, including the writing of the new participating life insurance by the New Company, and except assets of the book value of One Million, Seven Hundred Ninety-two Thousand, One Hundred Eighteen Dollars and Ninety-seven Cents (\$1,792,118.97) transferred by the Conservator to the Accident and Health Department.

"The said Three Million Dollars (\$3,000,000) transferred to the New Company for its capital stock constitutes and shall constitute the capital and paid-in surplus of the New Company; and neither the Partici-

From
Petitioner's Pamphlet
 (Tr. 112, 113)

From
Alleged Infringing Work
 (Tr. 12, 13)

pating Department nor the holders, present or future, of participating policies shall have any right, claim, or interest therein prior to other Departments or their policy holders."

Comparison of the second illustrative excerpts above quoted likewise reveals no copying and no similarity of means of expression unless copying and similarity can be found in the mutual use of the dollar sign.

Such are the petitioner's first two examples of copying and pirating. It would serve no useful purpose to further analyze or comment upon the examples which the petitioner sets forth. It is obvious that the only substantial similarity between any of the parallel excerpts in petitioner's brief is that, in some instances, they deal with similar subject matter. Their means of expression are completely dissimilar.

V.

Any Remote Similarity Between Petitioner's Pamphlets and the Alleged Infringing Publications Results From Common Subjects and Common Sources Within the Public Domain of Common Knowledge and Common Property.

There are, of course, some similarities between the alleged infringing works and petitioner's pamphlets. But in the same sense, and to the same extent, there are similarities between any two plans which provide for the reorganization of an insolvent life insurance company. Every such plan will contain provisions relating to many of the following subjects: transfer of assets, mutualization, reinsurance, assumption of policies, readjustment of liabili-

ties, payment of claims, reinstatement, moratorium, and agents' commissions.

In the treatment of this common subject matter every draftsman necessarily draws on common sources. The common sources in this case are the hundreds of plans of reorganization which have been prepared and proposed since it was first necessary to reorganize an insurance company and since it was first necessary to reorganize any corporation.

The similarity between a copyrighted work and an alleged infringing work which arises from common subject matter and common sources does not, to any degree, support a claim of infringement. (*Affiliated Enterprises, Inc. v. Gruber*, 86 F. (2d) 958, 961, C. C. A. 1st; *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, 17, C. C. A. 9th.)

The exhibits in this case are legal documents, and the rule as to legal documents is even more stringent than the general rule. The very necessity for similar documents in similar legal situations requires a plaintiff who claims infringement of a copyrighted legal document to establish that a very material portion of his work has been literally and exactly copied.

In *Dorsey v. Old Surety Life Insurance Co.*, 98 F. (2d) 872 (C. C. A. 10th), affirming a decree of dismissal in a case brought upon copyrighted insurance policies, the court said (p. 874):

"A copyright upon a form of contractual provision should not be construed so as to impinge upon the natural right of persons to make contracts containing the same contractual provisions and creating like contractual rights and obligations, and similarity of expression should not be held to constitute infringement in such cases. Necessarily, where the same contractual provision is to be expressed there will be similarity of language. To constitute infringement in such cases a showing of appropriation in the exact form or substantially so of the copyrighted material should be required."

To confer rights of any greater scope upon one who copyrights legal documents would be unthinkable.

Whatever similarities there may be between the alleged infringing works and petitioner's pamphlets are remote, indeed, and arise only in the common subject matter with which the documents deal and the common sources which all draftsmen of legal documents draw upon.

Petitioner's rights in a copyrighted legal document could be invaded only by substantial and exact copying. In this case the alleged infringing works are so unlike petitioner's pamphlets that a comparison leads only to the conclusion that if the draftsmen of the alleged infringing works ever saw any of the petitioner's pamphlets they completely shunned them.

VI.

Petitioner's Cause of Action, If Any, Is Not Against the Respondent.

The alleged infringing publications were, in fact, plans of reorganization and rehabilitation for the business and assets of a company which was the predecessor of the respondent (Tr. 7-35; 145-164). It is apparent from these exhibits that both plans were promulgated by the Insurance Commissioner of California acting as statutory conservator of the predecessor company, and that both plans were prepared for submission to, and were subject to the approval of, the Superior Court of California.

The Rehabilitation and Reinsurance Agreement dated July 22, 1936 (Tr. 7-35) is the plan which was approved in the California proceeding (Tr. 139). The respondent in this case is the product and not the author of that plan.

The proceedings taken before the Superior Court of California, including the approval of the Rehabilitation

and Reinsurance Agreement, were reviewed and affirmed by the Supreme Court of California and by this court. *Carpenter v. The Pacific Mutual Life Insurance Company of California*, 10 Cal. (2d) 307, 74 P. (2d) 761; *Neblett v. Carpenter*, 305 U. S. 297.

Petitioner's claim in this case embraces the contention that a corporation organized pursuant to a plan of reorganization approved in a statutory proceeding before a court of competent jurisdiction cannot print or distribute copies of the plan of reorganization for the information and use of its policyholders, creditors and other parties in interest (Petitioner's brief, p. 24). Certainly that result is not within the purview of the copyright laws. The respondent was bound to inform the persons who became its policyholders and creditors of their rights under the plan.

Since the plan was promulgated not by the respondent, but by the Insurance Commissioner of California, as statutory conservator of a predecessor company, if the petitioner ever had a cause of action it did not lie against the respondent but against the Insurance Commissioner of California.

VII.

The Decision of the Circuit Court of Appeals Is Not in Conflict With the Decision of Any Other Circuit Court of Appeals on the Same Matter.

Petitioner urges the court to review the decision below on the theory that there is a conflict of authority between two circuit courts of appeal upon the same legal proposition (Petitioner's brief, pp. 2, 14-16). No such conflict has been shown, however, and none exists.

The memorandum decision of the District Court expressed the specific opinion that there had been no sub-

stantial use of petitioner's means of expression and, accordingly, no infringement had occurred (Tr. 131). The decision of the Circuit Court of Appeals, affirming the District Court, stated (Tr. 176; 140 F. (2d) at page 184):

"We have compared the documents and are of the opinion that there is a substantial difference in defendant's language, sufficiently so to escape the charge of infringement."

From this language and from the decision which it affirmed it is clear that the decision of the Circuit Court of Appeals is grounded upon the finding that there has been no infringement because there is no substantial similarity between the means of expression in the alleged infringing works and the means of expression in petitioner's pamphlets. Petitioner has not and cannot produce any decision from any other circuit court of appeals in conflict with the basic principle there applied.

The opinion of the Circuit Court of Appeals also contains a discussion of the scope, if any, of the protection which petitioner obtained by filing his plans of reorganization in the Copyright Office. The opinion expresses the view that since a plan or system is not, as such, subject to copyright, the words used in expounding a plan or system should likewise not receive protection from the copyright law, for to give the words alone protection would permit the use of an admittedly usable plan or system only by evasive changes of language.

While that discussion does not constitute the decision of the court, the petitioner has apparently based his claim of conflict upon it.

Petitioner's efforts to find a conflict of decisions fail for at least three reasons.

In the first place, none of the three cases cited by petitioner (Petitioner's brief, pp. 14-16) establishes any

conflict whatever with the view expressed in the opinion below. None of the three cases dealt with a non-copyrightable subject such as a plan or system. In one case the copyrighted material was an advertisement (*Ansehl v. Puritan Pharmaceutical Co.*, 61 F. (2d) 131, C. C. A. 8th). Another dealt with a telegraphic code compilation (*Hartfield v. Peterson*, 91 F. (2d) 998, C. C. A. 2nd). The third dealt with catalogs (*R. R. Donnelley & Sons Co. v. Haber*, 43 Fed. Supp. 456). Each of these is admittedly a proper subject of copyright in itself, and none of the cases cited by petitioner has any bearing upon the scope of the protection, if any, obtained by filing a noncopyrightable plan or system in the Copyright Office.

In the second place, the views expressed in the opinion below were founded directly upon, and are in accord with, the decision of this court in *Baker v. Selden*, 101 U. S. 99. In the absence of a showing that the *Baker* case has been overruled by this court, there can be no doubt as to the applicable final authority.

Thirdly, the discussion of the scope of petitioner's protection, if any, was not necessary to the decision in the case and, therefore, constituted dicta. This the court itself recognized when it said (Tr. 176; 140 F. (2d) at page 184):

"It may be that we have gone further than necessary in denying plaintiff's claim as to infringement. This is so for the reason that defendant's alleged infringing material is not an exact copy of plaintiff's copyrighted pamphlets."

Since the views expressed were dicta they could not be the basis of a conflict of decisions even if contrary views of other circuit courts of appeals could be produced and even if the court below could be said to have misinterpreted the decision of this court in *Baker v. Selden*.

Disregarding, however, the fact that petitioner's ma-

terial constitutes a plan which, as such, is not copyrightable, and disregarding the view that the copyright laws may afford no protection at all to the words used in a plan which is not in itself the subject of copyright, the decisions are unanimous in holding that there can be no infringement where there has been no substantial copying or use of means of expression.

On that fundamental proposition of copyright law the decision of the court below was grounded. On that fundamental proposition no conflict of decisions has been, or can be, suggested.

Conclusion.

Neither the petition nor the brief in support thereof states any reason for a review of the decision of the Circuit Court of Appeals. A comparison of the exhibits in this case conclusively establishes that the alleged infringing works are not copies, in whole or in part, of any of the petitioner's pamphlets. The question of infringement was correctly decided by the Circuit Court of Appeals, and the decision is not in conflict with the decision of any other circuit court of appeals on the same subject matter.

The writ of certiorari should be denied.

Respectfully submitted,

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